IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5122 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RITESHBHAI RAKESHBHAI BHAVSAR THRO'MOTHER BHANUBEN R BHAVSAR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 5122 of 2001

MR HR PRAJAPATI for Petitioner No. 1

MR SS PATEL LD. AGP for Respondent No. 1-3

MS PJ DAVAWALA for Respondent No. 4

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 20/09/2001

ORAL JUDGEMENT

1. By means of filing this petition under Article 226 of the Constitution of India, the petitioner detenu, who has been detained by respondent no.2 District

Magistrate, Surat vide order dated 24/6/2001, Annexure-A, in exercise of powers conferred under Subsection-2 of Section 3 of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act,1980 ("PBM Act" for short), has challenged the said order and prayed to issue a writ of Habeas Corpus or any other appropriate writ, order or direction quashing and setting aside the order of detention and set the petitioner detenu at liberty forthwith.

2. Averments made in the petition and grounds of detention manifest that petitioner - detenu is a transpoter of blue kerosene, who unauthorizedly obtained the blue kerosene meant for public distribution and supplied to Shivan Petroleum, and the activities of the petitioner - detenu are in a manner prejudicial to the maintenance of supplies of essential commodities to the public at large and, therefore, the Detaining Authority found it necessary to detain the petitioner, as stated in the impugned order of detention.

3. The petition is contested by respondent no.1 State of Gujarat by filing affidavit-in-reply sworn by one Mr. H.C.Kadia, Deputy Secretary to the Government of Gujarat, Food, Civil Supplies and Consumer Affairs Department, Sachivalaya, Gandhinagar.

The petition is also contested by respondent no.4 - Union of India by filing affidavit-in-reply sworn by one Ms. S.L.Meena, Under Secretary in the Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution, New Delhi.

So far as the affidavit-in-reply filed by the respondent no.1 - State of Gujarat is concerned, it has denied all the averments, allegations and statements made by the petitioner. It further, inter alia, states that representation which was received by the State Government was considered and was duly rejected and the same was communicated to the petitioner - detenu accordingly. It is further stated that the file of the said representation was prepared by the Special Branch on 16/7/2001 and placed before the Under Secretary on 16/7/2001, who cleared the said file on the same day i.e. on 16/7/2001 and then, placed before the Deputy Secretary who cleared a file on 17/7/2001, and thereafter the file was placed before the Secretary, who cleared the file on 17/7/2001. It is further stated that thereafter, the file was placed before the Hon'ble Minister of Civil Supplies and the decision was taken by the Hon'ble Minister of Civil Supplies rejecting the said

representation on 17/7/2001 which was communicated to the detenu by letter dated 18/7/2001. Therefore, it is empathatically stated that there is no undue delay in consideration of the representation made by the petitioner.

So far as the affidavit-in-reply by filed respondent no.4 - Union of India is concerned, it is stated therein that no case has been made out by the petitioner - detenu for intervention and, therefore, petition is liable to be rejected.

4. Mr. H.R.Prajapati learned advocate for the petitioner has contended that the petitioner is not having any criminal history or has acted in a manner prejudicial to the maintenance of supply of essential commodities. It is empathatically contended by learned advocate for the petitioner that the order of detention dated 24/6/2001 approved by the State Government on 3/7/2001 and therefore, Detaining Authority has become functus officio after the approval of the order. Inspite of that, the Detaining Authority has considered the representation sent by petitioner - detenu on 3/7/2001 and rejected on 12/7/2001 and, therefore, consideration is bad in law. Once he is become functus officio, it is his duty to forward the representation, and not to decide the representation. In the instant case, he has decided as if he has got jurisdiction. Besides this, learned advocate for the petitioner has also contended that there is a considerable delay in forwarding the representation by the Detaining Authority. The Detaining Authority has received the representation on 30/6/2001 which was forwarded on 12/7/2001 and, therefore, on both the grounds the order of detention is vitiated. He, therefore, requested to allow the petition and set the petitioner at liberty forthwith.

Mr. S.S.Patel learned AGP has also contested the petition. However, he does not dispute the factual aspects like date of approval of the order of detention by the State Government and the representation received by the Detaining Authority and forwarded by the Detaining Authority to the State Government etc. Therefore, he requested to pass appropriate order. Ms. Davawala learned advocate for respondent no.4 also requested this Court that appropriate order may be passed in the light of settled principles enunciated by this Hon'ble Court.

5. I have considered the submissions advanced by the learned advocates for the parties and have perused the orders and documents annexed therewith and have also

taken into consideration the affidavits filed by the respondents.

6. On having perusal of the order impugned, there is no doubt that the Detaining Authority has passed the order of detention on 24/6/2001 which was approved by the State Government on 3/7/2001. There is also no dispute that the detenu made a representation vide application dated 29/6/2001 and the said representation was received by the Detaining Authority on 30/6/2001. The Detaining Authority has rejected the said representation on 12/7/2001 and again sent it to the State Government for further consideration.

It is settled principle of law that once the order of detention is approved by the State Government, the Detaining Authority has become functus officio and its role is only to accept the representation and send to the Government. Inspite of the aforesaid fact situation, the Detaining Authority has received the representation on 30/6/2001 which was to be decided on or before 3/7/2001 but it could not be decided before that date. Therefore, there is a delay in deciding the said representation. As the Detaining Authority has decided the said representation on 12/7/2001, the order of detention suffer from the vices of (i) delay in considering the representation by 13 days and (ii) representation received by the Detaining Authority ought not to have been decided by him after the approval of the detention order by the State Government. Besides this, the said representation had been forwarded to the State Government by the Detaining Authority.

7. In this connection, Mr. H.R.Prajapati learned advocate for the petitioner has relied upon the judgement of this Court in the case of Urmilaben N. Gandhi Vs. The Commissioner of Police reported in 1994 (2) GLH (U.J.) 10. In the said case, this Court has held that as delay of five days in considering the representation was not properly explained, the order of detention was invalid.

8. Applying the principles laid down by this Court in the case of Urmilaben (supra) to the facts of the present case, at the risk of repetition, be it stated that there is a delay of 13 days in considering the representation as well as sending the representation to State Government by the Detaining Authority. Besides this, the exercise undertaken by the Detaining Authority by which he has decided the representation is also bad in law as he had become functus officio in the eyes of law

in view of the fact that he decided the representation after approval of the detention order by the State Government.

9. In the aforesaid premise, the order of detention is bad in law and, therefore, requires to be quashed and set aside.

10. For the foregoing reasons, the petition succeeds and the same is allowed. The order of detention under challenge is quashed and set aside. The detenu - Riteshbhai Rakeshbhai Bhavsar is ordered to be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

(A.M.Kapadia,J.)

(vipul)